Dist

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN R. GONZALEZ, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	DOCKET NUMBER DA07529010201 DATE: DEC 1 1991

James A. Kosub, Esquire, San Antonio, Texas, for the appellant.

S. Breckenridge Thomas, Esquire, Kelly Air Force Base, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

An administrative judge of the Board's Dallas Regional Office issued an initial decision on May 23, 1990, sustaining the appellant's removal. The appellant has petitioned for review of that decision. After full consideration, we DENY the petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. For the reasons discussed below, however, we REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117 and AFFIRM the initial decision as

MODIFIED by the Opinion and Order, still SUSTAINING the appellant's removal.[1]

BACKGROUND

The agency removed the appellant from his GS-12 Contract Price Analyst position, effective January 12, 1990, based on the following three misconduct charges: (1) Attempting to use his public office for personal gain; (2) engaging in off-duty employment without requesting permission to do so; and (3) misrepresenting his entitlement to insurance proceeds related to an overseas hospital bill. The agency alleged that each charge violated its standards of conduct. The appellant, a nonprobationary employee in the competitive service, filed a petition for appeal of his removal. *See* Appeal File, Tab 1.

In his initial decision, the administrative judge sustained all three charges and found that the penalty was not unreasonable. He therefore sustained the removal.

The appellant has filed a timely petition for review. The agency has not filed a response to that petition.

ANALYSIS

1. The agency proved that the appellant violated its standards of conduct by attempting to use his public office for personal gain.

The first charge concerns two letters the appellant sent to the president of a company. At the time he sent those

---

[1] We have not considered the appellant's submission dated March 14, 1991, Petition for Review File, Tab 3, because it was not timely filed, and the appellant has presented no good cause for the untimeliness. 5 C.F.R. § 1201.114(f).

letters, the appellant was a member of an agency team that was negotiating a purchase contract with the company. Appeal File, Tab 4, Subtab G. In the first letter, the appellant expressed an interest in "get[ting] out in the real world and practic[ing] as a full-time CPA." He advised the company president that he had developed a cost formula that would "yield an additional $130,000 plus or minus to one of [the company's] cost elements in [its] current ... proposal," and he stated that he "ha[d] access and use a LOTUS 123 worksheet ... to compute the maximum DOD prescribed so called 'Profit Objective' via the "DOD Weighted profit Guidelines.'" In closing the letter, the appellant provided a telephone number by which the company president could reach him if the president thought he could use the appellant's "pricing/cost services." The president of the company responded in a letter in which he stated that he was "not willing to risk even the appearance of impropriety." *See id.*, Tab 4, Subtab W (copies of appellant's letter and president's response).

In the second letter cited in the proposal notice, the appellant referred to the "$150,000.00 [the company might] be leaving on the negotiation table" if its employees had not found the alleged defect in its proposal that the appellant had identified. He also stated that he was asking only for "a little financial security/assistance" between the time he quit his government job and the time he began receiving an adequate income in the private sector. In addition, he stated that he had "several projects in the back burner too numerous to

mention or discuss" in the letter, and that he would be happy to meet with the company president. *See id.* (copies of appellant's letter).[2]

The agency charged that the appellant's actions violated AFR 30-30, its regulations prescribing standards of conduct, because he was attempting to use his public office for personal gain. The administrative judge, in sustaining this charge, found that the appellant's communications with the company president clearly constituted attempts to solicit the company for financial gain and future employment.

In his petition for review, the appellant asserts that the administrative judge did not properly interpret AFR 30-30. He points out that, under section A-3-a(3) of those regulations, agency personnel "may have financial interests or engage in financial transactions to the same extent as private citizens not employed by the Government ... ." Petition for Review (PFR) File, Tab 1 at 1. He states further that section A-3-f, which prohibits "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct," does not prohibit the activities in which he engaged. *Id.*, Tab 1 at 1-2.

We do not find these allegations persuasive. Although section A-3-a(3) does generally allow agency employees to have financial interests and to engage in financial transactions,

---

[2] The parties stipulated that the appellant wrote and sent the letters in question. Hearing Tapes, tape 1, Side A (stipulations).

it permits those interests and transactions only "as long as they are not prohibited by law or this regulation." Appeal File, Tab 4, Subtab GG (AFR 30-30). Furthermore, the prohibitions listed in the other section the appellant cites in his petition for review, section A-3-f, are not limited to conduct of the kinds described in the petition. Instead, the section also provides as follows:

> [Agency] personnel must avoid any action, whether or not specifically prohibited by this regulation, that might result in, or create the appearance of:
>
> (1) Using public office for private gain ... .

We agree with the administrative judge that the appellant's communications with the company represented efforts to use his position as a contract negotiator for his private gain. The letters he sent the company president clearly were efforts to obtain compensation from the company -- or, as the appellant stated, efforts to obtain "a little financial security/assistance." Furthermore, his references, in each of those letters, to his alleged knowledge of a method for enhancing the company's position during the contract negotiations clearly shows that the appellant was using his position as a contract negotiator to obtain this compensation. The administrative judge therefore acted properly in sustaining this charge.

2. The agency proved that the appellant violated its standards of conduct by engaging in off-duty employment without prior approval and by doing so.

Sections A-9-f(1) and A-9-f(2) of AFR 30-30 require that an employee at the appellant's activity request the approval of the "ALC Commander, or designee, before engaging in any off-duty employment," and that this request be made on AFLC form 545. Appeal File, Tab 4, Subtab GG, SA-ALC-KAFB Supp. 1, AFR 30-30.[3] The agency charged the appellant with doing business as a certified public accountant (CPA) without submitting an AFLC form 545 requesting permission to do so.

The administrative judge noted that, according to the testimony of two agency officials, the agency had been aware that the appellant was working part-time preparing income tax returns for an income-tax preparer. He also noted, however, that those officials also testified that the appellant had not notified the agency that he also was practicing as a CPA, and that the appellant had admitted that he had opened his own business. He therefore found that the agency had proved this charge by a preponderance of the evidence.

In his petition for review, the appellant argues that the administrative judge "failed to correctly understand that

[3] The agency's regulations provide that advance approval must be submitted on AFLC form 545 to the employee's first- and second-level supervisors for their recommendations. The Staff Judge Advocate reviews the recommendations and submits the request to the appropriate approving official, who must approve or disapprove the request. This process is intended to ensure that the proposed off-duty employment is not contrary to the guidelines of AFR 30-30. See Appeal File, Tab 4, Subtab GG.

there is no significant difference between someone doing taxes and the work of a CPA." He asserts further that "[t]ax preparation in itself is a function of a CPA."

The work the appellant performed as a part-time employee of a tax preparer may not have differed significantly from the work he performed as a CPA doing business on his own. The appellant has not denied, however, that the off-duty employment at issue in this appeal was different from the work he performed for the tax preparer in that he had set up his own business as a CPA. As we have indicated above, the agency's standards of conduct require that an employee request approval before engaging in "any off-duty employment" (emphasis added). We see no proper basis, therefore, for finding that the agency's knowledge that the appellant was working as an employee of a tax preparer eliminates any need to request permission to begin work as a self-employed CPA. Accordingly, we find that the administrative judge did not err by sustaining this charge.

3. The agency did not prove that the appellant misrepresented his entitlement to insurance proceeds.

The facts concerning the third charge are undisputed. The appellant, while on an agency business trip overseas, suffered a heart attack and was hospitalized in Zurich, Switzerland. In response to the hospital's request, the agency provided the hospital with a statement from the appellant's health insurance carrier that the appellant's hospital expenses would be paid. Since the health insurance

carrier was dealing with expenses incurred in a foreign hospital, it paid the amount due under the insurance policy ($7,598.88) to the appellant instead of to the hospital. The appellant, who was experiencing financial difficulties, used the insurance funds for his personal needs and did not pay the hospital bill.

In its proposal notice, the agency charged that the appellant misrepresented his entitlement to the $7,598.88. The administrative judge construed this charge as one of failing to pay his debt to the hospital, and he sustained it.[4] We find, however, that this construction of the charge is incorrect. As we have indicated above, the agency charged the appellant with misrepresenting his entitlement to the money he received from his insurance company. Agency File, Tab 4, Subtab G. It did not charge him with failing to pay a debt. *See id.*

We find further that the charge the agency brought against the appellant -- that of misrepresenting his entitlement to the insurance money -- cannot be sustained.

---

[4] In sustaining the charge, the administrative judge cited *Monterosso v. Department of the Treasury*, 6 M.S.P.R. 684 (1981). In his petition for review, the appellant asserts that, for the following reasons, the administrative judge misapplied *Monterosso*: (1) The employee in *Monterosso* "had refused to pay debts that had gone to judgment"; (2) there was no evidence that the appellant in the case now before the Board was not in the process of paying that bill, or that he had refused to pay it; and (3) there was no evidence that this appellant's superiors had ordered him to pay the bill. PFR, Tab 1 at 2. In light of our findings regarding this charge, it is not necessary to address the merits of these allegations.

Even assuming that the statements the agency has made in support of that charge are entirely true, they do not show that the appellant misrepresented his entitlement to the money.[5]

In its proposal notice, the agency supported this charge by stating that the appellant had failed to send the insurance proceeds to the hospital and had given as his reason for doing so his belief that the Department of Labor (DOL) should pay the hospital. The agency alleged that: (1) The appellant knew that his November 1988 workers' compensation claim had been denied; (2) he did not appeal the denial; and (3) agency officials had told him that, even if DOL approved his claim and paid his hospital bill, he would be required to refund the insurance carrier for its earlier checks to avoid dual payment. Appeal File 4, Subtab G (proposal notice at 2-3).

To sustain a charge of misrepresentation, the agency must prove by the preponderance of the evidence that the employee knowingly supplied incorrect information and that he did so with the intent to defraud the agency. *See Howell v. Department of the Navy*, 35 M.S.P.R. 31, 37 (1987), citing *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986). The only statement by the appellant that the agency has identified in connection with this charge is the appellant's statement that he believed DOL should pay the

[5] For this reason, and in light of our determination concerning the reasonableness of the penalty of removal, it is not necessary to remand this appeal to the regional office for credibility or other factual determinations.

hospital bill. While this statement evidently reflected a belief in which the agency did not concur, we note that it was only an expression of the appellant's opinion. Furthermore, in light of the agency's acknowledgment that it had advised the appellant of the error in his reasoning, we see no proper basis for finding that the appellant's expression of his opinion was made with an intent to defraud or even mislead the agency.

We also note that the agency's references to the denial of the appellant's claim, and to the appellant's failure to appeal that denial, could be interpreted as including allegations that the appellant misled agency officials regarding the status of his workers' compensation claim. At the time the appellant expressed his opinion regarding DOL's obligations, however, the period of time allowed for appealing the denial had not yet expired. *See* Appeal File, Tab 4, Subtab U at 6 (notice of appeal rights). The absence of any pending appeal at that time therefore does not establish that the appellant had decided to abandon his claim. Furthermore, the record indicates that a copy of the decision to deny the appellant's claim was sent to the agency, *see id.*, Tab 4 at 1, and that DOL had advised the appellant, when it acknowledged receipt of the claim, that it would advise the agency in writing of its decision on claim; *see also id.*, Tab 4 at 7.

Under the circumstances described above, we find no basis for concluding that the appellant knowingly, and with an intention of defrauding the agency, supplied incorrect

information regarding his entitlement to the insurance payments. The charge therefore cannot be sustained.

4. The appellant's removal is within the limits of reasonableness in light of the two sustained charges.

Whenever an agency's action is based on multiple charges, not all of which are sustained, the Board will consider whether the sustained charges merit the penalty imposed by the agency. *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 308 (1981). In making this determination, the Board will consider all factors related to the reasonableness of the penalty imposed. *Id.*

The appellant had 24 years of Federal service at the time of his removal, and he had no prior disciplinary record. These factors are relevant considerations in this case. We note, however, that the sustained charge that the appellant used his position for personal gain is a very serious one, and that the other sustained charge also reflects adversely on the appellant's integrity. Furthermore, the record shows that the appellant's duties were fiduciary in nature, and that his position required him to deal with difficult and complex acquisitions involving millions of dollars. *See* Appeal File, Tab 3, Subtab CC (position description); Hearing Tapes, Tape 1, Side A (testimony of deciding official). The nature of these duties therefore required his honesty and integrity. *See Corbett v. Department of the Treasury,* 21 M.S.P.R. 544, 546 n.2 (1984). For these reasons, we find that the penalty of removal does not exceed the limits of reasonableness. *See*

Connett v. Department of the Navy, 31 M.S.P.R. 322, 327-28 (1986), *aff'd* 824 F.2d 978 (Fed. Cir. 1987) (Table).[6]

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

[6] Before proposing this action, the agency proposed to suspend the appellant for 30 days based on the misconduct at issue in charge one. According to the testimony of the deciding official, the proposed penalty was based on opinions expressed by agency staff members that a 30-day suspension was the maximum penalty that could be imposed based on that misconduct. When the agency learned of the facts underlying the other two charges in this appeal, however, the proposal notice was rescinded and a new notice proposing removal was issued. *See* Hearing Tapes, Tape 1, Sides A and B (testimony of Smith and Steely). We do not consider the original proposal persuasive evidence regarding the penalty that the agency would have imposed in the absence of charge three, since the original proposal was based only on the first sustained charge, and not on the second. Moreover, as we have stated above, we find that removal is a reasonable penalty for the two sustained charges.

representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.